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No. 829

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

W. JAKE BROWN D/B/A TIA WANNA AND LYNN FARR D/B/A CENTRAL MUSIC COMPANY ..... *Appellants*

v.

J. ORVILLE CHENEY, COMMISSIONER OF REVENUES, STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

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v.

J. ORVILLE CHENEY, COMMISSIONER OF REVENUES, STATE OF ARKANSAS.....*Appellee*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Supreme Court of Arkansas entered on October 2, 1961, rehearing denied November 6, 1961, upholding the validity and constitutionality of an Arkansas Statute imposing a license fee of $250.00 per year on qualified owners, operators and lessors of coin-operated amusement devices and upholding the validity and constitutionality of the Arkansas Statute requiring persons to have resided in Arkansas at least one year prior to becoming eligible to secure a license as the owner, operator or lessor of coin-operated amusement devices. Appellants submit this statement to show that the Arkansas Statute involved violates the provisions of the Fourteenth Amendment to the Federal Constitution; that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

OPINIONS BELOW

There were two appeals to the Supreme Court of Arkansas. The first was from a Judgment of the Pulaski County Chancery Court, First Division, sustaining a Demurrer to appellants' Complaint. The Opinion and Decree of the Chancery Court of Pulaski County, Arkansas, First Division, is unreported. The Opinion of the Supreme Court of Arkansas, delivered April 25, 1960, reversing the Decree of the Chancery Court of Pulaski County, Arkansas, is officially unreported but is to be found in The Law Reporter, Vol. 106, dated April 25, 1960, at Page 597. Copy of the original opinion is attached hereto as Appendix "A" (p. 12). (See also R. 23.)

The second Opinion and Decree of the Chancery Court of Pulaski County, Arkansas is also unreported. That Opinion dismissed the Complaint of appellants for want of equity. Upon appeal to the Arkansas Supreme Court an Opinion was delivered on October 2, 1961, which is also unreported. The Opinion is to be found in The Law Reporter, Vol. 108, dated October 2, 1961, at Page 300. Copy of the original opinion is attached hereto as Appendix "A" (p. 14-25).

The Order of the Supreme Court of Arkansas denying the appellants' Petition for Rehearing was entered on November 6, 1961 (R. 103).

JURISDICTION

The Opinion of the Supreme Court of Arkansas was delivered October 2, 1961 (R. 93). The Judgment of the Supreme Court of Arkansas was entered on October 2, 1961 (R. 99). Rehearing was denied on November 6, 1961 (R. 103). Notice of Appeal to the Supreme Court of the United States was filed November 15, 1961 (R. 106).

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Sec. 1257(2).

The Federal questions here sought to be reviewed were specifically and properly presented by pleading, briefs and Petition to Rehear (R. 100-101 and 107), and were considered by, and determined adversely to the rights of appellants as is reflected by Certificate as to existence of a Federal ques-

tion ordered to be entered by the Arkansas Supreme Court (R. 104). A copy of said Certificate is hereto attached as Appendix "B" (p. 26-27).

The Supreme Court of Arkansas in its opinion delivered October 2, 1961 specifically refers to Amendment 14 of the Constitution of the United States and attempts to distinguish between "citizenship" and "residency", while holding that the Statute under review deals only with "residency". The Court in its opinion entered into a discussion of the Federal questions here sought to be reviewed and relied upon and cited cases attempting to point out the difference between "resident" and "citizen" (R. 98). It is therefore apparent the Supreme Court of Arkansas decided this case upon the constitutional issues raised, pleaded and argued by the appellants.

QUESTIONS PRESENTED

(1) Whether the sections of the Statute under review are arbitrary, capricious, discriminatory, confiscatory and contrary to the police powers of the State of Arkansas; and (2) whether the sections of the Statute are in violation of Section One, Amendment 14 to the Constitution of the United States.

STATUTES INVOLVED

The Statutes of the State of Arkansas under review are Sections 84-2622—84-2632 inclusive, Arkansas Statutes, 1947 (Act 120, 1959 General Assembly), set forth in Appendix "C" (p. 28-32). We use the word "Statute" interchangeably with the word "Act". At the time the original complaint was filed Act 120 had not been officially designated by a Statute number.

STATEMENT

Appellants originally commenced an action for declaratory judgment December 6, 1960, under the provisions of Sec. 34-2581 *et seq.* Arkansas Statutes, 1947, to determine the validity of Act 120 of the 1959 General Assembly (Sec. 84-2622—84-2632, Arkansas Statutes, 1947, Appendix "C", p. 28).

Appellant, W. Jake Brown d/b/a Tia Wanna, operates a supper club on the outskirts of the city of Little Rock and is a long-time citizen and taxpayer of Little Rock, Pulaski County, Arkansas. The appellant, Lynn Farr, is a citizen of Texarkana, Texas. He operates a music vending machine business on the Arkansas side of the line under the trade name of Central Music Company. The appellee is the Commissioner of Revenues of the State of Arkansas. Brown owns and operates one music vending machine, commonly referred to as a "Juke Box", in connection with his supper club, while Farr owns several of the music vending machines which he leases to various residents of the State of Arkansas and in return receives a portion of the income from each machine.

In the original action mentioned above it was alleged the provisions of the Act are arbitrary, capricious, discriminatory and confiscatory, and that the Act contravenes Amendment 14 to the Constitution of the United States and various sections of the Constitution of the State of Arkansas. A Demurrer was filed to that Complaint which was sustained. Upon appeal to the Supreme Court of Arkansas the Decree of the Lower Court was reversed with directions to overrule the Demurrer and for further proceedings not inconsistent with the Court's Opinion (Appendix "A", p. 12-13). Thereafter, on October 21, 1960, the matter was presented to the Court upon its merits (R. 29). Testimony was taken *ore tenus* (R. 30-89 Inc.). In support of appellant's position, Exhibit 1 was introduced (R., five unnumbered pages following p. 89). From this exhibit it will be noted that at the time the matter was presented to the Chancery Court of Pulaski County, Arkansas, there were 117 operators who had listed 3,634 music machines and 3,156 other devices operated by coins, making a total of

6,790 coin-operated devices licensed pursuant to the provisions of the Statute here being reviewed. The 117 operators having purchased the $250.00 annual license fee as prescribed by Sec. 84-2625 Arkansas Statutes, 1947, paid the Revenue Commissioner a total of $29,250.00. Nowhere in the Act will it be found that the revenue thus derived has been appropriated for any purpose. Nor will it be found that any provision was made to supervise the operation of the coin-operated machines, whether they be of the "juke box" type or "other devices". This suit is not concerned with the licensing of the "other devices". We are only concerned with the Statute as it applies to music vending machines.

Pursuant to the provisions of Sec. 84-2604, 1947 Arkansas Statutes, a licensee must pay the State of Arkansas a $5.00 tax upon each music machine. That tax has been on the Statute Books since 1931. The tax directed to be collected by Sec. 84-2625, Arkansas Statutes 1947, of $250.00 must be collected in addition; however, under the latter section of the Statute, any person qualified, and who is issued a stamp by the Revenue Commissioner of the State of Arkansas, is privileged to operate one machine, 10,000 or any number of machines that person desires to operate so long as the above mentioned $5.00 tax on each machine is paid.

Upon the remand of the original case to the Pulaski County Chancery Court, First Division, as reflected by the Mandate of the Arkansas Supreme Court (R. 23), no additional pleadings were filed. The appellants here relied entirely upon their original Complaint (R. 2). The appellee filed no answer.

At the conclusion of the hearing before the Pulaski County Chancery Court, First Division, trial briefs were filed by the respective parties. After consideration thereof, on December 6, 1960, the Lower Court directed a Decree for the appellee finding the Statute under review to be a valid exercise of the police power of the State and in all respects fair and reasonable; that said Statute does not deprive anyone of the right to engage in a lawful business; that said Statute is not confiscatory and does not deny

equality of privilege; that said Statute is not contrary to the due process or the equal protection of the law clause or any other section of either the Constitution of the United States or the Constitution of the State of Arkansas. Appellants' Complaint was dismissed for want of equity (R. 25).

Upon appeal to the Supreme Court of Arkansas, these appellants by original brief and brief in support of a Petition for Rehearing, reiterated and consistently argued that the Statute here involved is and was arbitrary, capricious, discriminatory and confiscatory and contrary to the police powers of the State and violative of Section One of Amendment 14 to the Constitution of the United States. Additionally, appellants argued that the Statute is in violation of various sections of the Constitution of the State of Arkansas.

Specifically, appellants argued in the Lower Court and in the Supreme Court of the State of Arkansas that the validity of a police regulation primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power; that in every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power; that a statute to be within this power must be reasonable in its operation upon the persons whom it affects; that it must not be for the annoyance of a particular class and must not be unduly oppressive. The record reflects, and it is undisputed, that Brown, the operator of Tia Wanna supper club, operates his machine at his own expense from the time he opens in the late afternoon until such time as customers care to make individual music selections. The customers then deposit coins and listen to music of their choice. Whatever revenue is derived from the machine belongs to Brown. He accounts for the income by paying State and Federal Income Tax thereon. Brown testified the purpose of the machine at his place of business was two-fold: (1) to listen to music, and the other, so that his customers would have music by which to dance. He considered it essential to the

operation of his business to have the machine or some similar type. Brown further testified people like to select their own music; that if patrons do not wish to deposit coins in the music machine they do not have to; that the machine cost him $1,523.52; that he has to buy the records and pay for the electricity to operate the machine; that his income from the one music machine is approximately $2,000.00 annually. The Supreme Court of Arkansas stated in its opinion Brown was free to own as many machines as he wanted to—without paying a further charge—but what this statement has to do with the constitutionality of the Statute is foreign to our thinking. It appears that the question here is whether or not the Legislature has overstepped its authority by imposing unusual restrictions on a lawful calling, not warranted by any known facts. Those restrictions constitute an unwarranted interference with the right of a citizen to pursue a lawful business.

The record further reflects that under Sec. 84-2623, Arkansas Statutes 1947 (Appendix "C", p. 28) the appellant, Farr, has been put out of business simply because he is not a resident of the State of Arkansas. In order to qualify he would have to be out of business and move to the State of Arkansas for at least one year prior to making application for the license. This is a clear cut case where the Legislature of the State of Arkansas overstepped its power of regulation and has suppressed a business in its entirety. It has been argued consistently by appellants that there has never been, and there is not now, any necessity for enactment of the Statute under review.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved relate directly to the police powers of the State of Arkansas; to the use or enjoyment of a public right and whether or not a Statute enacted by the Legislature is constitutional where it seeks to regulate a business which has no relation to the preservation of the public health, morals, safety or welfare. Another of the issues involved is the right of an individual to acquire and own property and to deal with it as he chooses so long as he harms nobody. The enjoyment of private property can-

not be interfered with or limited arbitrarily. The playing of a music machine is not against public health, morals, safety or welfare. Another issue involved is the right of appellant, Farr, a citizen and resident of the State of Texas, to operate a business in the State of Arkansas. The City of Texarkana is divided. One part of the city is in Arkansas, the other part in Texas. While Farr maintains his home on the Texas side of the line, he maintains his business and pays taxes thereon on the Arkansas side. Still another issue involved is the right of the General Assembly of Arkansas to require a $3,000.00 surety bond prior to the issuance or renewal of any license under the provisions of the Statutes here under review and as particularly set forth in Sec. 84-2632 (Appendix "C", p. 28-32). The appellants have contended, and now contend, that this section of the Statute which requires the same surety bond from the operator of one music vending machine as it does from the operator of 10, 50 or 100, is contrary to Section 1 of Amendment 14 to the United States Constitution. Appellants assert that the questions presented are so substantial as to require the consideration of this Court, with briefs on the merits and oral argument for a final determination.

Appellants contend that the Supreme Court of the State of Arkansas have relied primarily upon the case of *White* v. *Adams*, 233 Ark. ....., 343 S. W. (2) 793, which is a fortune-telling case. While the case deals with the general subject of privileges, it does not deal with the ownership of property as a privilege. And it must be conceded that under the Constitution of Arkansas, Article II, Sec. 22, the right of property is before and higher than any constitutional sanction. The majority of the Supreme Court point out in their opinion (Appendix "A" p. 14) that it is common knowledge that coin-operated "juke boxes" are not usually placed in the home. That may be quite true, but as Mr. Justice Robinson stated in his dissenting opinion, "it is equally a matter of common knowledge that coin-operated music machines in the form of television sets are now widely used in homes and at this very time facilities for putting such machines in homes in Little Rock are being installed. In view of the decision in this case, it is now very likely that each owner of such a coin-operated machine will

have to pay an annual tax of $250.00 for the privilege of listening to music that may be provided by such a machine." The dissenting opinion of Mr. Justice Robinson is to be found in Appendix "A", p. 18.

The issues clearly indicate the Statute under review violates the due process clause of Amendment 14 to the Constitution of the United States and prevents the appellant, Farr, and others similarly situated from engaging in a lawful, private business or occupation. The decision of the Arkansas Supreme Court is contrary to *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940, 54 Supreme Court 505, 89 A. L. R. 1469; *Murphy* v. *California*, 225 U. S. 623, 56 L. Ed. 1229, 32 Supreme Court 697; *Breard* v. *City of Alexandria*, 341 U. S. 622, 95 L. Ed. 1233; *Adams* v. *Tanner*, 244 U. S. 590, 61 L. Ed. 1336; *Farux* v. *Corrigan*, 275 U. S. 312, 66 L. Ed. 254; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 76 L. Ed. 747; *Mutual Loan Co.* v. *Martel*, 222 U. S. 225, 56 L. Ed. 175; *Plessy* v. *Ferguson*, 163 U. S. 537, 41 L. Ed. 256; *Blake* v. *McClung*, 172 U. S. 238, 43 L. Ed. 432; *Lawton* v. *Steel*, 152 U. S. 133, 38 L. Ed. 385; *State* v. *Julow*, 129 Mo. 163, 29 L. R. A. 257; *State* v. *Washmood*, 58 Ark. 609, 26 S. W. 11; *Standard Oil Co.* v. *Brodie*, 153 Ark. 114, 239 S. W. 753; *Thompson* v. *Wiseman*, 189 Ark. 852, 75 S. W. (2) 393.

In further support of our contention that the Statutes under review are unconstitutional we invite the Court's attention to the following cases: *New Brunswick* v. *Zimmerman*, 79 F. (2) 428, (C. C. A. 3); *Baldwin* v. *Franks*, 120 U. S. 678, 30 L. Ed. 766; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 67 L. Ed. 1103, 43 Supreme Court 630; *Travis* v. *Yale*, 252 U. S. 464, 64 L. Ed. 460; *Eastman, et al* v. *Yellow Cab Co., et al*, 173 F. (2) 874, (C. C. A. 7); *Glicker* v. *Michigan Liquor Control Commission*, 160 F. (2) 96, (C. C. A. 6); *Weinberg, et al* v. *Northern Pacific Railway Co.*, 150 F. (2) 645, (C. C. A. 8); *McGriff* v. *State*, 212 Ark. 98, 204 S. W. (2) 885; *Baldwin* v. *Blytheville*, 212 Ark. 975, 208 S. W. (2) 458; *Replogle* v. *Little Rock*, 166 Ark. 617, 36 A. L. R. 1333.

CONCLUSION

The questions presented by this appeal are substantial, of public importance and in the public interest. The questions presented are of importance and interest, not only to the individuals involved but to others who engage in businesses which are of themselves innocuous and which are sought to be regulated oppressively by the Legislatures of the various states. It can be seen that it is not necessary for one to stretch one's imagination to determine that if the Arkansas Supreme Court decision is to stand, the Federal Communications Commission will soon become involved by reason of music coming into the homes of hundreds of thousands of individuals through the medium of pay television. Then there is the important issue of whether a state can tell a resident of a sister state that he cannot come into Arkansas and do business without moving over here. Appellants submit that the decision of the Supreme Court of Arkansas is erroneous and contrary to the controlling principles of law applicable to the issues here involved.

This Court should in the public interest require briefs on the merits of the issues involved and hear and determine those issues so that citizens of the United States may know what their rights are when they go into another state to do business, and for the other reasons as herein set forth.

Respectfully submitted,

D. D. Panich,

Attorney for Appellants.

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Little Rock, Arkansas.

PROOF OF SERVICE

I, D. D. Panich, Attorney for the Appellants herein, a member of the Bar of the State of Arkansas and of the Bar of the Supreme Court of the United States of America, do hereby certify that on the 28th day of March, 1962, I served a copy of the foregoing Jurisdictional Statement upon Lyle Williams, Esquire, Attorney for the Appellee, and upon Glenn F. Walther, Esquire, of counsel for the Appellee, by mailing a true copy of the Jurisdictional Statement to each of said counsel, postpaid, at their respective addresses, State Capitol Building, and Boyle Building, Little Rock, Arkansas.

D. D. Panich,

Attorney for Appellants.

APPENDIX "A"

Brown v. Cheney, Commr.

5-2117

Opinion delivered April 25, 1960.

Sam Robinson, Associate Justice. This action was filed by appellants under the provisions of the Declaratory Judgment Act (Ark. Stat. § 34-2501, et seq.) against the Arkansas State Revenue Commissioner to determine the validity of Act 120 of 1959.

The complaint alleges that: Appellant Brown is the owner of Tia Wanna Club in Little Rock and owns in connection therewith one music vending machine, or "juke box", which is operated by a coin slot device; appellant Farr, a resident of Texarkana, Texas, does business as Central Music Company and owns and leases several music vending machines, all located in the State of Arkansas; both appellants have attempted to purchase privilege tax stamps for each machine as required by Ark. Stat. § 84-2604, but appellee has refused to sell them same because appellants have not complied with the provisions of Act 120 of 1959.

The Act in question declares the owning, operating or leasing of coin operated machines such as those owned by appellants to be a privilege and requires, before the issuance of a license, that applicant must, among other things, pay an annual fee of $250, procure a surety bond of $3,000, be above 21 years of age, and be a resident of the State of Arkansas for at least one year prior to the date of application. At least one-half of any partnership or corporation applicant must be owned by an Arkansas resident who has been such for at least one year prior to the date of application.

There are a number of other provisions of the Act relating to requirements for issuance of a license and regulatory features thereafter, which need not be detailed here. Appellants' petition alleges that the provisions of the Act are "arbitrary, capricious and discriminatory and are con-

fiscatory in their purpose" and violate the Arkansas Constitution, particularly §§ 2, 3, 18, 19 and 29 of Article 2, and are a denial of equality of privileges and authorize the creation of a monopoly and are a restraint of trade.

Appellee filed a demurrer to the petition on the ground it does not state facts sufficient to constitute a cause of action. The chancery court sustained the demurrer, and hence this appeal.

For reversal appellants make a number of arguments in addition to those alleged in their petition, but it is not necessary to set them out here. The petition alleges that Act 120 of 1959 is arbitrary, capricious, discriminatory and confiscatory, in violation of the Arkansas Constitution. Whether or not these allegations are true is a question of fact which if proved could render the statute unconstitutional. The provisions of the Declaratory Judgment Act set forth the manner by which determinations of issues of fact shall be made. Ark. Stat. § 34-2508. The degree must therefore be reversed with directions to overrule the demurrer and for further proceedings not inconsistent herewith.

APPENDIX "A"

Brown *v.* Cheney, Commissioner.

5-2446

Opinion delivered October 2, 1961.

Appeal from Pulaski Chancery Court, First Division; *Murray O. Reed*, Chancellor; affirmed.

Paul Ward, Associate Justice. Appellant Brown, a citizen and resident of this state, owns and operates a supper club in Little Rock. Appellant Farr, a citizen and resident of Texas, owns and operates the Central Music Company in Texarkana, Arkansas. Brown owns, and operates in connection with his business, one "juke box" or record playing machine into which the customers insert a coin. Farr owns several "juke boxes" and pinball machines which he leases to different persons for use in this state. In this litigation we are concerned only with "juke boxes" or music vending machines. Ark. Stats. § 84-2604 imposes a "privilege tax" of $5 on "each music vending phonograph" to be paid annually by the owner to the Commissioner of Revenues. This tax is not here challenged by appellants.

In 1959 the legislature passed Act 120 (Ark. Stats. §§ 84-2622 to 84-2632). Section 84-2622 declares the owning, operating or leasing of "coin operated amusement devices" to be a privilege, and that such owners, operators or lessors shall pay a fee for such privilege in addition to the $5 on each machine mentioned above. Section 84-2623 (b) provides that no one can secure such a privilege license unless, among other things, he has been a resident of this state for at least one year. The section following fixes an annual license fee of $250. Section 84-2628 requires the licensee to keep certain records (available to the Commissioner) relative to a determination of sales taxes. Section 84-2632 requires a $3,000 bond by each applicant "to insure the faithful and prompt payment of all sales tax . . ." etc.

When Appellee, Commissioner of Revenues, let it be known that the tax would be imposed on appellants, they

filed suit in Chancery Court for a declaratory judgment to invalidate said Act 120 on the grounds that it is unconstitutional and "in violation of constitutional rights of plaintiffs and other taxpayers similarly situated. . . ."

Appealing from an adverse decree, appellants urge a reversal on the grounds that: (a) The Act is arbitrary, discriminatory, confiscatory, and against the police powers of the state; and (b) The Act is in violation of certain provisions of the State and Federal Constitutions.

(a) In trying to determine whether Act 120 is arbitrary and confiscatory, etc. the first interesting question presented is whether owning and operating a coin-operated music machine is a *privilege*—i. e. whether the legislature can so declare it. In their brief appellants make this statement: "It is admitted the operation of music vending machines falls within the class commonly referred to as a *privilege*, that reasonable taxes can be imposed, but not such taxes and regulations as will be oppressive, arbitrary, discriminatory or confiscatory, such as are included in Act 120." (Emphasis added.)

Despite the above admission, we think the question should be examined further. On first impression it might appear that a "juke box" is harmless, and that its owner should be allowed to play it as a common right, but there are other things to be considered. It is common knowledge that coin operated "juke boxes" are not usually placed in the home, but are frequently used in dance halls, drinking places, and amusement spots. Pinball machines, the operation of which is conceded to be a privilege and so declared by statute and this Court, can also be used and operated in a perfectly harmless way, but by association and abuse they often lead to unwholesome results. The legislature, in regulating "juke boxes" had a right to take all these things into consideration. In the case of *White, County Treasurer* v. *Adams*, decided March 13, 1961, 233 Ark. , 343 S. W. 2d 793, which upheld Act 48 of 1945 placing a tax of $100 a week on fortune tellers, we said:

"The lawmakers are entitled to believe that no human being has the power of foretelling future events and that

therefore fortune telling may be a fraudulent means of preying upon the ignorant, the superstitious, and the gullible. Consequently it has been uniformly held that the state, in the exercise of its police power, may constitutionally prohibit fortune telling altogether."

One of the best definitions of *police power* of which we are aware is found in *Hinebaugh* v. *James, Tax Com'r.*, 119 W. Va. 162, 192 S. E. 177. It reads:

"The police power of a state is an attribute of sovereignty, co-extensive therewith, difficult of definition because it cannot be circumscribed by mere words, latent in its nature, yet, nevertheless, perennially existing as a vast reservoir of authority to be drawn on by the law-making branch of the government for the public good. Within constitutional limits, the police power may be exercised to promote the safety, health, morals, and general welfare of society."

We are inclined to the view that in the case before us the legislature did not exceed constitutional limitations in its effort to protect the morals and general welfare of society. This view is strengthened by the presumption that said Act 120 is constitutional. See *State* v. *Hurlock*, 185 Ark. 807, 49 S. W. 2d 611, and *Miller Levee District No. 2* v. *Evers, Collector*, 200 Ark. 53, 137 S. W. 2d 915.

Having concluded that we are here dealing with a *privilege*, it must be concluded that the legislature has great latitude in regulating it. Article 16, § 5 of the State Constitution first deals with uniformity of taxation and then says: ". . . the General Assembly shall have power from time to time to tax . . . privileges, in such manner as may be deemed proper."

Conceding, as contended by appellants, that the legislature under the above quoted section cannot impose a tax that is arbitrary or confiscatory, we still think Act 120 must be sustained. The Act is not arbitrary because there are good reasons, mentioned in the Act, why the legislature needed the required information for the purpose of collecting sales taxes and use taxes. Nor do we find the Act to be confiscatory. Although Brown owns only one "juke box"

on which he must pay $250 each year, he is free to own as many as he likes without further charge. Also, the record reflects that Brown's income from the one box is in excess of $2,000 annually.

(b) As heretofore noted, Act 120 provides that no person can secure a license unless he has resided in Arkansas for at least one year. Farr is not a resident of Arkansas. It is appellants' contention that the residence requirement violates that part of Amendment 14 of the Constitution of the United States which states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." We think this contention is without merit. In the first place the Amendment deals with *citizenship* while Act 120 deals only with *residency*, and the two words have entirely different meanings. Under the Act a citizen of this state would not be eligible for a license unless he had a residency of one year. The great weight of authority supports the validity of similar residence requirements where only a privilege is involved.

In the *Hinebaugh* case *supra*, the Court said: "The purpose of the quoted language of the fourteenth amendment [same as heretofore] is to protect citizenship of the United States as distinguished from citizenship of the several states." Further, in the same case, the Court said the language in the Amendment furnished an "additional guaranty against encroachment by the states on those *fundamental* rights which belong to citizenship." (Emphasis added.) In the cited case the Court upheld a residency requirement to distribute nonintoxicating beer in West Virginia. Also, in the cited case, the Court noted that: "A West Virginia *citizen* residing beyond the state is not eligible. . . . Under this regulation citizens of other states are entitled to exactly the same privileges and immunities as are *citizens* of West Virginia." (Emphasis added.) Numerous decisions point out the difference between "resident" and "citizen". See *Ullman* v. *State*, 1 Tex. Ct. App. R. 220, 28 Am. Rep. 405; *Wyman* v. *Wyman* (Nev.), 49 F. Supp. 952; *Jeffcott* v. *Donovan* (Ariz.), 135 F. 2d 213; *Philip La Tourette* v. *Fitz Hugh McMaster* (S. C.), 248

U. S. 465, 39 Sup. Ct. 160, 63 Law. Ed. 362, and *C. N. Hankins* v. *Spaulding, Com'r.*, 78 Ida. 533, 307 Pac. 2d 222.

It is significant we think that our legislature, without successful challenge, has many times favored residents over nonresidents in regulating certain privileges, such as: The manufacture and sale of wine (Ark. Stats., § 48-110); Retail beer dealers (§ 48-515); Fur dealers (§ 47-202); The taking of mussels (§ 47-601, C.), and the practice of optometry (§ 72-806).

Appellants' contention that Act 120 violates Article 2, §§ 2, 3, 18, 19 and 29 of the State Constitution has been examined and found without merit. Section 2 deals with inalienable *rights*—not with privileges; Section 3 refers to discrimination based on race or color; Section 18 refers to discriminations between citizens or class of citizens; Section 19 refers to monopolies, and; Section 29 deals with rights retained by the people. We are unable to see how any of the above sections are related to or are violated by Act 120.

It is our conclusion, therefore, that the decree of the trial court must be, and it is hereby affirmed.

ROBINSON and JOHNSON, JJ., dissent.

SAM ROBINSON, Associate Justice, dissenting. As authority for the holding that the ownership of a coin operated music machine, which in fact is a very fine musical instrument costing over $1,500, is a privilege and taxable as such, the majority cite the case of *White* v. *Adams*, 233 Ark. ..... , 343 S. W. 2d 793, which is a fortune telling case. Although that case deals with the general subject of privileges, it does not touch on the subject of the ownership of property as a privilege. There is hardly any comparison between the right to tell fortunes and the right to own property.

In the case at bar we are dealing with one of the most sacred constitutional rights. Article 2, § 22 of the Constitution of Arkansas provides: "The right of property is before and higher than any constitutional sanction: . . ." Appellant Brown is in the restaurant business. Incidental to that business he has available for the enjoyment of his

customers a music machine that may be played by depositing a coin in a slot. In my opinion it is not a privilege to own and use such a machine; it is a matter of common right. It is conceded by all that Brown could play the machine at his place of business to his heart's content if he would remove the coin operation feature of it and play the machine by merely pressing a button or by permitting the customers to do so. And, according to the reasoning of the majority, a customer could pay the cashier for playing the machine and no privilege would be involved. But if a nickel is put in the slot, it is a privilege. The right to listen to good music, or bad music if one prefers, has been a common right of mankind since before the dawn of recorded history. Even the least advanced of savage tribes have some form of music, but here if one uses a small coin in a certain way to enable him to listen to recorded music of his choice, a privilege is involved.

In the very early days of statehood the question of what is a privilege first came before the courts, and although since that time a number of things have been declared to be privileges, this Court has always sustained the doctrine that a matter of common right cannot be converted into a privilege by an act of the legislature. The majority say that to own, operate or lease a coin operated music machine is a privilege. But Act 120 of 1959 provides that "The business of owning, operating or leasing coin operated amusement devices . . . is hereby declared to be a privilege. . . ." The majority point out that "It is common knowledge that coin operated 'juke boxes' are not usually placed in the home." This is true enough, but it is equally a matter of common knowledge that coin operated music machines in the form of television sets are now widely used in homes and at this very time facilities for putting such machines in homes in Little Rock are being installed. In view of the decision in this case, it is now very likely that each owner of such a coin operated machine will have to pay an annual tax of $250 for the privilege of listening to music that may be provided by such machine. I can hardly see how there can be any valid distinction between music that comes over the air and thence through a

machine and music that comes from a record through a machine.

The first case to come before the Court on the question of what is a privilege was *Stevens & Woods* v. *State*, 2 Ark. 291. Article VII, § 2 under "Revenues", of the Constitution of 1836, in respect to the taxing of property and privileges, is the same as Art. 16, § 5 of the Constitution of 1874. In the *Stevens & Woods* case there was involved the constitutionality of a tax assessment of $1,000 on the keeping of two billiard tables. The issue decided by the Court was whether the keeping of a billiard table could be taxed as a privilege. The Court held that it could not be so taxed; that it was a matter of common right and could not be converted into a privilege by an act of the legislature. The case is closely in point with the case at bar, because not only is the same principle involved, but the Court actually compared the keeping of a billiard table with the keeping of musical instruments. We take the liberty of quoting rather extensively from the *Stevens & Woods* case. The Court said: "The meaning of the word 'privilege' is to be looked for in the common law. In the realm of England, and by the English law, there were a multitude of privileges of various kinds, most of which never crossed the Atlantic or took root in our soil. . . . In this country few, if any, privileges exist by prescription, and few of those known in England exist by Legislative grant. But it is a certain class of privileges created in all the States by grant from the Legislature, such as banking, the privilege of keeping ferries, and holding and keeping toll-bridges, of making and receiving toll on turnpikes, canals, and railroads; and unquestionably other privileges of the same nature might be created, and when created, would be taxable. These are all special rights, powers, and privileges, not existing before, but created *pro hac vice*, and granted out by the Legislature as exclusive rights and franchises. Such privileges which are sources of wealth, or rather wealth in themselves, created and conferred by Legislative grant, and not capable of valuation like tangible and corporeal property, are property taxable as privileges.

"But the Legislature cannot, by first prohibiting the use of any article or the exercise of any calling, and then

allowing it upon payment of a certain sum into the Treasury, create a privilege. If this could be done, there would no longer be any meaning or effect in the provision that no one species of property should be taxed higher than another species of property of equal value. If this could be done, the Legislature could tax every bureau a hundred dollars, or every table, or chair, or sofa, or book-case, to the same amount, merely by prohibiting the use or possession of each article except upon payment of such sum, and so making it a privilege to have, use, or possess it. They might pass sumptuary laws, and tax shoes, boots, hats, coats, cloaks, and every article of dress, comfort, luxury or necessity, by pursuing the same course, and making it a privilege to have, wear, or possess it.

"There are certain rights which belong to us as free men; we do not derive all our rights from Legislative grant; we have some which belong to us by nature, and as citizens of a free country; such are the rights of holding any species of property we choose, of wearing whatever garments we choose, and of possessing and holding any article of comfort or luxury which we please. As all [of] them belong to us originally, they cannot be converted into privileges by any process of Legislative alchemy. No such magical transmutation can be effected. If it could, nothing would be easier than by the enactment of sumptuary laws and acts creating privileges to transform us at one sweep from free citizens of a republic to the mere serfs of the soil.

"The right to keep and use a billiard table is one of these common rights. It is an article of furniture which every citizen had the right to own and possess before we framed the Constitution, and the Legislature cannot confer upon us the *privilege* of keeping what we already *ex communi jure* have the right to keep and use. Privileges are not so created; if they are, every thing can be transmuted into a privilege, and by undergoing this process, an article of property worth a hundred dollars may today be taxed one dollar and tomorrow a thousand, while another article of the same, may still remain subject to the original tax of one dollar. Why not in the same tax the privilege of raising cotton, or hemp, or wheat, and so make a tax payable by one portion of the State alone.

"The playing of billiards has not been yet made a criminal or penal offense, and therefore every person has the right either to keep or play on such a table. He has the same right to do so that he has to *keep or play on a flute, violin, or organ;* and if one can be made a privilege while it is lawful for every man, so may the other. There is nothing unlawful or criminal in one more than in the other, by the law of nature, or the code of morality, neither *malum prohibitum* or *malum per se.* To keep a billiard table therefore stands upon the same ground with keeping any other article of furniture, or for the purpose of amusement, and one cannot be changed into a privilege any more than the other.

"A privilege, therefore, is a new right created by Legislative grant; not a right existing before and common to all, but now prohibited unless on payment of a sum into the exchequer. It is a portion of the prerogative of the State, carved out and given to an individual or a corporation. This is no such privilege. Nor could a privilege be created by declaring the keeping of a billiard table criminal, and then allowing it on payment of a sum in gross; that would be pandering to crime and present the strange spectacle of Legislative creation of a privilege to commit crime. It might be forbidden altogether, but it could never be made a privilege.

"The keeping of a billiard table, therefore, is no privilege, and therefore cannot be taxed as such, and if so, it follows, as an inevitable consequence, that the law in question is unconstitutional. That it is so we have not the slightest doubt." (Emphasis supplied.)

In the same volume of the Arkansas Reports, there is the case of *Gibson* v. *Pulaski County*, 2 Ark. 309. It was there held that the keeping of a stallion was a matter of common right and that it could not be taxed as a privilege. In *Washington* v. *State*, 13 Ark. 752, a distinction between a state tax and a county or municipal tax was pointed out; decisions in the *Stevens & Woods* case and the *Gibson* case were left intact. About ninety years later Judge Frank Smith wrote the original opinion involving the validity of the state income tax in the case of *Sims* v. *Ahrens*, 167

Ark. 557, 271 S. W. 720 (1925). There Judge Smith cited the cases of *Stevens & Woods* v. *State* and *Gibson* v. *Pulaski County*, above mentioned, along with *McGehee* v. *Mathis*, 21 Ark. 40; *Straub* v. *Gordon*, 27 Ark. 625; *Barton* v. *Little Rock*, 33 Ark. 442; *Little Rock* v. *Board*, 42 Ark. 160; *Baker* v. *State*, 44 Ark. 134; and *State* v. *Washmood*, 58 Ark. 609, 26 S. W. 11, and said: "Under the doctrine of *stare decisis*, these cases have become the settled law of this State, and, until they are overruled, which up to this hour has not been done, this court cannot consistently hold that it is within the power of the Legislature to declare and tax as privileges, for State revenue, pursuits and occupations which are matters of common right. To so hold would be to overrule all these cases, and, if they are to be overruled at all, it should be done expressly, and not by implication."

A rehearing was granted and Judge Wood wrote the majority opinion holding that the state income tax is neither a property tax nor a privilege tax, but is an excise tax and not prohibited by Art. 16, § 5 of the Constitution. The Court referred to the case of *Stevens & Woods* v. *State*, 2 Ark. 291, and other cases of a similar nature, on down to *Standard Oil Co.* v. *Brodie*, 153 Ark. 114, 239 S. W. 753, and said: "Those cases have not been overruled, and therefore the above provisions of our Constitution should be interpreted to read as follows: 'The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper, but it shall not tax for purposes of State revenue pursuits and occupations that are matters of common right.'"

In *Thompson* v. *Wiseman*, 189 Ark. 852, 75 S. W. 2d 393, appellant owned and operated certain coin operated devices. Act 137 of the General Assembly for the year 1933 provides for assessing a tax on vending machines, including music vending machines. The Court upheld the tax, but treated the case as applying to those who operated the machines. The 1933 Act provides: "It shall be unlawful for any person, firm or corporation, or agents or receiver thereof, to operate or permit the operation of any of the machines mentioned in Section 1 of this Act. . . ." Now

the majority are holding that mere ownership of such machines is prohibited without first having paid the $250 tax.

In my opinion the Act under consideration, Act 120 of 1959, does not provide for a tax for the mere ownership or operation of a single music machine, but does tax the *business* of owning, operating or leasing coin operated music devices. There is nothing in the record in this case to indicate that appellant Brown is in the business of owning and operating or leasing music machines. He is in the restaurant business. The fact that he incidentally uses a stove certainly does not mean that he is in the stove business, nor does the fact that he may incidentally use a pick-up truck mean that he is in the business of owning, operating or leasing trucks. On the other hand, appellant Lynn Farr, doing business as the Central Music Company, is in the business of owning, operating and leasing the machines. The $250 tax assessed against him is valid under the decision in *Thompson* v. *Wiseman*.

I might add that the effect of Act 120 of 1959 is to give certain residents of Arkansas engaged in the business of owning all kinds of slot operated devices, including coin operated music machines, a monopoly in that field, and this is against public policy. No doubt a goodly portion of the operators own dozens and perhaps hundreds of such slot operated devices and it would be no burden on them to pay an annual tax of $250. But in many instances the little man having but one machine in his restaurant cannot afford to pay the $250 in addition to the sales tax paid at the time of the purchase of the machine, the regular annual ad valorem taxes, the sales tax on the money taken in by the machine, the federal income tax and the state income tax on the money received. Hence, he will have to use a machine belonging to a big operator, and pay as rent at least one-half, or perhaps more, of the money taken in by the machine. According to the record, there are in the State only 117 owners of coin operated devices alleged to come under the Act. This includes people such as Brown who own only one machine. The 117 owners own 6,790 machines

in the State; hence, the operators own an average of 58 machines each. When it is considered that many owners have only one, a very few must own a large number, many more than the average of 58.

For the reasons set out herein, I respectfully dissent from that part of the opinion which holds that Brown is liable for the tax.

Mr. Justice JOHNSON joins in this dissent.

APPENDIX "B"

FILED
Nov. 13, 1961
Philip N. Gowen
Clerk

IN THE SUPREME COURT OF ARKANSAS

W. JAKE BROWN, d/b/a TIA WANNA and
LYNN FARR, d/b/a CENTRAL MUSIC COMPANY — APPELLANTS

VS. — No. 2446

J. ORVILLE CHENEY,
COMMISSIONER OF REVENUES — APPELLEE

APPEAL FROM PULASKI COUNTY CHANCERY COURT
HONORABLE MURRAY O. REED, CHANCELLOR

CERTIFICATE OF STATE COURT AS TO EXISTENCE OF A FEDERAL QUESTION

On Motion of appellants, W. Jake Brown, d/b/a Tia Wanna, and Lynn Farr, d/b/a Central Music Company, this Court, in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the Judgment and Entry of Affirmance heretofore rendered and made herein, that in the prosecution of error from the Chancery Court of Pulaski County, Arkansas, and in the arguments by brief, made in this Court on behalf of the appellants, it was insisted and relied upon by said appellants that Act 120 of 1959 (Arkansas Statutes 1947, Sections 84-2622 to 84-2632) and the action of state officials thereunder is illegal and void and violative of Section One of Amendment No. 14 of the Constitution of the United States, and it became material to the determination of said case in this Court to determine said question so made by the appellants, which was determined adversely to said appellants, as appears in the Entry and Judgment of Affirmance heretofore made herein.

It is hereby certified that this Court is the highest court of law and equity in the State of Arkansas in which a decision of this case could be had.

The Clerk of this Court is directed to file this Certificate and to make the same a part of the official record of proceedings had in this case.

s/*Carleton Harris*

CARLETON HARRIS

CHIEF JUSTICE

SUPREME COURT OF ARKANSAS

APPENDIX "C"

84-2622 Privilege tax on ownership, operation and leasing of amusement devices.—The business of owning, operating or leasing coin operated amusement devices, including but not limited to coin operated amusement devices, as defined in Sections 2 and 4 of Act 201 of the Acts of the General Assembly of 1939 (Section 84-2611 Ark. Stats. of 1947) is hereby declared to be a privilege, and it is further declared that the owners, operators and lessors of such machines shall pay a fee for such privilege, in addition to the privilege tax required by law to be paid on amusement devices.

84-2623 Qualifications of applicant for license.—No license as required in Section 1 above shall be issued unless:

(a) The applicant is above the age of twenty-one (21) years,

(b) The applicant is a resident of the State of Arkansas and has been such for at least one (1) year prior to the date of his application,

(c) At least one-half (1/2) of any partnership or corporation applicant is owned by a resident of Arkansas who has been such for at least one (1) year prior to the application.

84-2624 Issuance of License—Revocation or suspension—Appeal.—Licenses for the privilege of owning, operating or leasing said coin operated amusement devices shall be issued by the Commissioner of Revenues. At the time of the issuance of such licenses each licensee shall be assigned a number. Applications for such licenses shall be on a form prescribed by the Revenue Commissioner. The Revenue Commissioner may revoke or suspend the license authorized hereunder for a cause. Any person, partnership or corporation who is a licensee under this Act shall be notified in writing that the

revocation or suspension of their license is being considered and the reason therefor, and the licensee shall have fifteen (15) days in which to notify the Commissioner that a hearing is desired, after which a hearing shall be had not less than fifteen (15) days subsequent to the expiration of the fifteen (15) day period of notice. Any licensee whose license has been revoked or suspended may appeal to the Chancery Court of Pulaski County, Arkansas, within twenty (20) days after revocation or suspension by filing a copy of the notice of such revocation or suspension with the Clerk of the Chancery Court and causing a summons to be served on the Commissioner of Revenues. The case shall be tried *de novo* in the Chancery Court and either party may prosecute an appeal to the Supreme Court of the State of Arkansas as in other cases.

84-2625 License fee—Restriction on municipal taxes or licenses.—The annual fee for the license herein provided shall be $250.00. No municipality may levy a privilege tax on the basis of this Act; provided that nothing in this Act shall be construed to prohibit municipalities from levying privilege taxes on licensees under this Act under other statutes of this State or under valid municipal ordinances.

84-2626 Restrictions on issuance of license.—No license as provided herein shall be issued to any convicted felon, any person of known criminal tendencies or to a former licensee whose license has been revoked, until two (2) years subsequent to the date of such revocation.

84-2627 Evidence of payment of sales tax or payment of use tax.—All licensees under this Act shall, within ten (10) days of the date of purchase or lease of any amusement device, upon which an annual privilege tax is levied by the State, furnish the Revenue Commissioner with a copy of the invoice or lease agreement showing the description and serial

number of such device and evidence that the Arkansas Sales Tax has been paid. In the event that the device was purchased or leased from outside the State, the invoice or lease agreement shall be accompanied by the appropriate form and a check or money order for the Arkansas Use Tax.

84-2628 Lease of amusement devices—Records—Payment of sales tax from receipts.—In all cases where a licensee hereunder leases amusement devices to others, it shall be the duty of the licensee to keep records of the amount of rent received by the licensee and the amount retained by the lessee and to furnish carbon copies of such records to the lessee. It is the duty and obligation of the licensee to ascertain the amount of sales tax due on the receipts of the machine and to withhold the amount of such tax from such receipts and to remit same to the Arkansas Revenue Department. The amount of such sales tax shall not be taken into consideration in determining the rent due the licensee. All records required to be kept by the licensee under the provisions of this Act shall be made available to the Arkansas Revenue Commissioner within a reasonable time after request or the license of the offending licensee may be revoked as provided herein.

84-2629 Failure to obtain license—Machine declared nuisance—Seizure and sale—Redemption—Any person who engages in the business of owning, operating or leasing coin operated amusement devices without first obtaining the license herein prescribed is declared to be maintaining a public nuisance and any amusement device or devices so operated may be seized by any authorized agent of the State Revenue Department and sold by the revenue Commissioner at public auction on an order of the Pulaski Chancery Court; provided, however, that such devices may be redeemed prior to sale by their owner upon the payment of any sales or use tax due on such devices, the sales tax

on the receipts of such wrongfully operated machine, all costs and expenses incurred in connection with the seizure and obtaining the order of Court, and a penalty of Five Hundred Dollars ($500.00). If such offender shall apply for a license as herein provided, within thirty (30) days subsequent to the payment of such penalty, Two Hundred Fifty Dollars ($250.00) of such penalty shall be allowed as the first annual license fee in the event the license is granted.

84-2630 License fees paid on fiscal year basis.—The effective date of this Act shall be the first day of July, 1959, and annual fees shall be paid on a fiscal year basis beginning July 1 of each year. Licenses issued subsequent to July 1 shall be paid for as though they were for a full year.

84-2631 License number displayed on machine—Effect of absence of number.—In addition to the tax stamp, which must be displayed on each amusement device as required under other statutes, each licensee hereunder shall procure and exhibit, on each amusement device owned or operated under such license, a decal or card showing the number of the license under which the device is operated. Any coin operated amusement device exhibited without the decal or card showing the number of the licensee as required herein, is hereby declared to be the maintenance of a public nuisance, and such a device may be seized as provided in Section 8 above, provided, however, that if the owner of said machine is a licensed operator under this Act, he may redeem such machine upon the payment of Ten Dollars ($10.00) penalty.

84-2632 Bond of owner, operator or lessor of coin operated amusement device.—Prior to the issuance or renewal of any license hereunder, the Revenue Commissioner shall require the applicant to procure a suitable surety bond in the principal sum of

$3,000.00 to insure the faithful and prompt payment of all sales tax, use tax or privilege tax which may become due in connection with the operation of the licensed business and to secure the faithful performance of all duties and obligations imposed by this Act.